Banque Nationale De Paris v Wong Hai Ong

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-192 OF 1999-III(II)
MUHAMMAD KAMIL J
25 NOVEMBER 1999

Civil Procedure *— Summons in chambers — Copy not sealed — Whether attempted service of unsealed copy of application constitutes good service*

The plaintiff obtained a judgment dated 18 December 1998 against the defendant in the High Court of Singapore and had it duly registered on 25 June 1999 at the High Court in Kuching. The order of 25 June 1999 ('the order') stipulates that the defendant be at liberty to set aside the said registration within 14 days after service upon him within the jurisdiction of the notice of such registration. The judgment and the notice was served on the defendant on 6 August 1999. Later, the defendant filed an application to set aside the registration of the order. On 23 August 1999, the defendant served on the plaintiff an unsealed copy of the application to set aside the registration of the order, which service the plaintiff 'accepted without prejudice and under protest'. However, the sealed copy of the application was subsequently served on the plaintiff on 1 September 1999, ie 11 days out of time. There was no application made to extend time by the defendant. At the hearing of the plaintiff's preliminary objection, the plaintiff contended that the notice was served on the defendant on 6 August 1999 and the defendant's application and affidavit in support were served on the plaintiff on 1 September 1999 which were 11 days late, outside the 14 days as stipulated by the order of the 25 June 1999. The issues were: (i) whether the attempted service of the unsealed copy of the application constitutes good service which is sufficient for purposes satisfying the stipulated 14 days in the order; and (ii) whether the order merely requires the defendant to file the application to set aside the registration order without serving the application on the plaintiff.

Held, dismissing the application of the defendant:

An unsealed application which was served on the plaintiff notifying that an application had been made and filed in court is not valid until it is signed, sealed and dated by the court. The defendant had 14 days within which to serve the application and the defendant served it on the plaintiff on 1 September 1999 which was clearly 11 days out of time. There was no application for extension of time under O 3 r 5 of the Rules of the High Court 1980 within which to serve the application on the plaintiff. In the absence of such an application, the court cannot on its own volition extend the time (see p 159F–I). It does not make sense that the defendant may just file an application to

A set aside the registration of the order without serving the application on the plaintiff. It is implicit that, having filed the application, it must be served on the plaintiff to complete the process (see p 159D–E).

[Bahasa Malaysia summary

B Plaintif telah memperolehi suatu penghakiman bertarikh 18 Disember 1998 terhadap defendan di Mahkamah Tinggi di Singapura dan ia telah didaftarkan pada 25 Jun 1999 di Mahkamah Tinggi Kuching. Perintah 25 Jun 1999 tersebut ('perintah tersebut') menyatakan bahawa defendan bebas untuk mengetepikan pendaftaran tersebut C dalam masa 14 hari selepas serahan kepadanya di dalam bidang kuasa notis berkenaan dengan pendaftaran tersebut. Penghakiman dan notis telah diserahkan kepada defendan pada 6 Ogos 1999. Kemudian, defendan memfailkan permohonan untuk mengketepikan pendaftaran perintah tersebut. Pada 23 Ogos 1999, defendan telah menyerahkan kepada plaintif suatu salinan yang tidak bermeterai D permohonan untuk mengetepikan pendaftaran perintah tersebut, di mana serahan tersebut plaintif telah 'terima tanpa prejudis dan dengan bantahan'. Namun, permohonan bermeterai tersebut kemudiannya diserahkan kepada plaintif pada 1 September 1999, iaitu 11 hari di luar masa. Tiada permohonan telah dibuat untuk memanjangkan tempoh masa oleh defendan. Semasa perbicaraan E bantahan awal plaintif, plaintif menegaskan bahawa notis telah diserahkan kepada defendan pada 6 Ogos 1999 dan permohonan defendan dan afidavit sokongan telah diserahkan kepada plaintif pada 1 September 1999 yang adalah 11 hari lewat, di luar 14 hari seperti yang diperuntukkan oleh perintah 25 Jun 1999. Isu adalah sama ada: F (i) cubaan untuk menyerahkan salinan permohonan yang tidak bermeterai terjumlah kepada serahan yang baik yang mencukupi bagi tujuan memuaskan 14 hari yang diperuntukkan di dalam perintah tersebut; dan (ii) sama ada perintah tersebut hanya memerlukan defendan untuk memfailkan permohonan untuk mengetepikan pendaftaran perintah tersebut tanpa menyerahkan permohonan G tersebut kepada plaintif.

Diputuskan, menolak permohonan defendan:

Suatu permohonan yang tidak bermeterai yang telah diserahkan kepada plaintif yang memberitahu bahawa suatu permohonan telah H dibuat dan difailkan di mahkamah adalah tidak sah sehingga ia ditandatangani, dimeterai dan ditarikhkan oleh mahkamah. Defendan mempunyai 14 hari untuk menyerahkan permohonan tersebut dan defendan telah menyerahkan kepada plaintif pada 1 September 1999 yang jelas adalah 11 hari di luar masa. Tiada permohonan untuk perlanjutan masa di bawah A 3 k 5 Kaedah-Kaedah Mahkamah I Tinggi 1980 untuk menyerahkan permohonan tersebut kepada plaintif. Di dalam ketiadaan permohonan tersebut, mahkamah tidak boleh membuat dengan kerelaannya sendiri untuk memanjangkan

masa (lihat ms 159F–I). Ia adalah tidak masuk akal bahawa defendan boleh memfailkan permohonan untuk mengketepi-kan pendaftaran begitu sahaja tanpa perlu untuk menyerahkan permohonan ke atas plaintif. Adalah tersirat bahawa, selepas memfailkan permohonan tersebut, ia mesti diserahkan ke atas plaintif untuk menyempurnakan proses tersebut (lihat ms 159D–E).]

Notes

For cases on summons in chambers, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4802–4809.

Cases referred to

Elite Jewellers Sdn Bhd v Wong Ting Kai [1998] 6 MLJ 511 (refd)
Loo Sze Kin v Cheong Choy Teik [1997] 4 MLJ 537 (refd)
Michael Chong Shui Keong v Fong Shui En [1996] 5 MLJ 177 (refd)
Mohd Afsar Yunus v Handal Utama Sdn Bhd [1995] 2 CLJ 118 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)
Pemunya Kapal M v Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453 (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 5, O 32 r 3, O 67 r 7(3)

Collin Jarraw (*Ting Goh & Associates*) for the plaintiff.
Rosleenda Sayumi bte Ismail (*Idris & Co*) for the defendant.

Muhammad Kamil J: The plaintiff obtained a judgment dated 18 December 1998 against the defendant in the High Court in Singapore, and had it duly registered on 25 June 1999 at Kuching High Court. The judgment and the notice thereof dated 2 August 1999 was personally served on the defendant on 6 August 1999. The defendant's advocate, by a letter dated 20 August 1999, informed the plaintiff's advocate that he had filed a summons in chambers ('the application') for setting aside the registration of the said order. On 23 August 1999, the defendant attempted to serve an unsealed copy of the application on the plaintiff, that is 3 days outside the time limit, which service the plaintiff 'accepted without prejudice and under protest'. However, the sealed copy of the application was subsequently served on the plaintiff on 1 September 1999, ie 11 days out of time. There was no application made to extend time by the defendant.

On 22 October 1999, the plaintiff served a notice on the defendant that it would raise a preliminary objection on the late service of the application. At the hearing of the preliminary objection, the plaintiff contended that the said notice was served on the defendant on 6 August 1999, and the

A defendant's application and affidavit in support were filed and served on the plaintiff on 1 September 1999 which were 11 days late, outside the 14 days as stipulated by the said order of the 25 June 1999, the relevant part thereof reads as follows:

> B ... it is further ordered that the abovementioned Wong Hai Ong (Malaysian NRIC no 560413-13-5567) be at liberty to set aside the said registration within 14 days after service upon him within the jurisdiction of the notice of such registration. ...

Learned counsel for the defendant, Cik Rosleenda averred that the notice to inform the plaintiff that the application to set aside the registration had C been filed well within time. The 25 June 1999 order did not expressly state that the service of the application to set aside the registration must be made within the 14 days period.

The issue for the decision of the court is whether the attempted service of the unsealed copy of the application and the notice thereof, constitutes good service which is sufficient for purposes satisfying the stipulated 14 days D in the order.

It is clear from the wordings in the said order that the plaintiff (Wong Hai Ong) was 'at liberty to set aside the said registration within 14 days after service ...' means naturally that the application for setting aside must be made and served within 14 days. It does not make sense that the defendant E may just file an application to set aside the registration of the order without serving the application on the plaintiff. It is implicit that having filed the application, it must be served on the plaintiff to complete the process, and this must be done within the 14 days after service of notice of registration. With respect, I find it difficult to accept the view expressed by the learned counsel that the application need be filed without more ado.

F It is trite that an unsealed application which was served on the plaintiff notifying that an application had been made and filed in court, was not valid until it was signed, sealed and dated by the court. See *Elite Jewellers Sdn Bhd v Wong Ting Kai* [1998] 6 MLJ 511.

Cik Rosleenda further submitted that the inference of O 67 r 7(3) of the G Rules of the High Court 1980, is that the application need only be filed in court. In the case the defendant had filed the application on 20 August 1999 in court, and the sealed copy was returned by the court to the defendant only on 26 August 1999. The delay in returning the sealed application by the court was not within the contemplation of the defendant. I do not think it is correct that the court could be faulted in this matter. The defendant had H 14 days within which to serve the application and the defendant served it on the plaintiff on 1 September 1999 which was clearly 11 days out of time.

Extension of time

I There was no application for extension of time under O 3 r 5 Rules of the High Court 1980 within which to serve the application on the plaintiff. In the absence of such an application, the court cannot on its own volition extend the time.

In *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105, the court held that:

> It is trite law that the court has an unfettered discretion to grant or refuse an extension of time. The first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period.

In *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191, the Court of Appeal said that:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But, it is not an unprincipled discretion. There must be some relevant evidential material made available to us before the Court may exercise discretion.

In *Mohd Afsar Yunus v Handal Utama Sdn Bhd* [1995] 2 CLJ 118, the court held that:

> I am of the view that the learned sessions court judge was in error when she on her own volition extended the time to allow the application to be made without any application under O 3 r 5 of the Subordinate Court Rules 1980.

In dismissing the application, the court said:

> On the question of enlargement of time under O 3 r 5 I am of the view that the respondents should file an application for the sessions court judge to decide whether to grant or not to grant extension of time.

In *Michael Chong Shui Keong v Fong Shui En* [1996] 5 MLJ 177, the court held that the appellant had not made an application supported by an affidavit giving reasons why he served the notice of appeal five days late and why he filed and served the memorandum of appeal out of time. What the appellant should have done is to apply for an extension of time by an application supported by an affidavit.

The more recent case of *Pemunya Kapal M v Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 states that:

> ... a formal application for extension or abridgement of time under O 3 r 5 of the RHC had to be filed before the court would consider the matter
>
> ... the application for an extension should preferably be filed before the time expired.

Any attempt to argue and introduce authorities at this stage when an application had not been made is tantamount to giving evidence from the Bar and the courts would not tolerate. Evidence given from the Bar without there being a formal application is to be deprecated against: see *Loo Sze Kin v Cheong Choy Teik* [1997] 4 MLJ 537; and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281.

Cik Rosleenda further submitted that under O 32 r 3 of the Rules of the High Court 1980 in any proceedings, an application in chambers requires two clear days before the hearing date. In the case, the application was

served on 1 September 1999 a month and a half before the hearing date, which the defendant had satisfied the provision for time in respect of service. With respect, learned counsel is correct that an application in chambers must be filed and served two clear days before the hearing date, but in the instant case it cannot cure the defect of late service of the application.

In the circumstances, I would uphold the objection, and dismiss the defendant's application with costs to the plaintiff.

Defendant's application dismissed.

Reported by Benjamin Yong